

DAVID ROBERTS, )  
 )  
 Plaintiff, ) No. CV-09-3037-CI  
 )  
 v. ) ORDER DENYING PLAINTIFF'S  
 ) MOTION FOR SUMMARY JUDGMENT  
 ) AND GRANTING DEFENDANT'S  
 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
 of Social Security, )  
 )  
 Defendant. )  
 )

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 16.) Attorney D. James Tree represents David Roberts (Plaintiff); Special Assistant United States Attorney Willy M. Le represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

On August 14, 2003, the Commissioner denied Plaintiff's prior application for disability benefits. (Tr. 21.) Plaintiff did not appeal the denial.<sup>1</sup> On December 13, 2004, Plaintiff reapplied for

<sup>1</sup> Because Plaintiff is reapplying for disability benefits, he is precluded from claiming disability prior to the August 14, 2003, decision finding of non-disability. On review, Plaintiff has the

1 disability benefits (DIB) and Supplemental Security Income (SSI).  
2 (Tr. 68, 198.) He alleged disability due to back, neck, knee,  
3 shoulder injuries, with an onset date of December 2, 1999. (Tr. 51,  
4 62.) His claim was denied initially and on reconsideration. (Tr.  
5 43-44, 312-13.) Plaintiff requested a hearing before an  
6 administrative law judge (ALJ), which was held on April 12, 2007,  
7 before ALJ Richard Say. (Tr. 233-62.) Plaintiff, who was  
8 represented by non-attorney Steven R. Hamman during the  
9 administrative proceedings (Tr. 9-11), and vocational expert Tom  
10 Moreland (VE) testified. The ALJ denied benefits on August 21,  
11 2007, and the Appeals Council denied review. (Tr. 21-30, 5-7.) The  
12 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 13 STATEMENT OF THE CASE

14 The facts of the case are set forth in detail in the transcript  
15 of proceedings and are briefly summarized here. At the time of the  
16 hearing, Plaintiff was 47 years old with a high school education. He  
17 was married and lived in a house with his spouse and two sons. (Tr.  
18 238-39.) Plaintiff has past work experience as an aircraft  
19 assembler, which is classified as medium level work. (Tr. 256.) He  
20 has had surgery on both knees, his shoulder and neck. (Tr. 241.)  
21 He reported he cannot work because of increasing pain in his knees,  
22 joints and shoulder from arthritis, a neck injury, and degenerative  
23 disease. (Tr. 240.) He testified he could stand for an hour, walk  
24 around a city block, sit for 45 minutes and lift a gallon of milk.  
25 (Tr. 244-45.) He said he has decreased strength in his left hand

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27 burden to show his claimed impairments have become more severe.

28 *Green v. Heckler*, 803 F.2d 528, 530 (1986).

1 due to shoulder and neck surgery. (Tr. 245.) He stated he did not  
2 take medication for pain because he could not afford it. (Tr. 241.)  
3 Plaintiff testified he helps with some household chores, watches  
4 television, sits at the computer, reads, and shops while leaning on  
5 a cart. He reported he does all the driving for the family. (Tr.  
6 243-44.)

#### 7 ADMINISTRATIVE DECISION

8 ALJ Say first noted Plaintiff was denied benefits in a hearing  
9 decision dated August 14, 2003. He did not find good cause to  
10 reopen the prior decision, and determined disability in this case  
11 could not be established before August 15, 2003, the day after the  
12 prior hearing decision. (Tr. 21.) He then found Plaintiff's date  
13 of last insured for DIB purposes was December 31, 2003. (Tr. 22.)  
14 At step one, ALJ Say found Plaintiff had not engaged in substantial  
15 gainful activity since December 2, 1999, the alleged onset date.  
16 (Tr. 23.) At step two, he found Plaintiff had severe impairments of  
17 "degenerative disk disease of the cervical and thoracic regions of  
18 the spine, left shoulder impingement, and musculoskeletal  
19 impairments of the knees." (Tr. 24.) The ALJ determined at step  
20 three the impairments, alone and in combination, did not meet or  
21 medically equal one of the listed impairments in 20 C.F.R., Appendix  
22 1, Subpart P, Regulations No. 4 (Listings). (Tr. 24.) At step  
23 four, he determined Plaintiff could perform a wide range of  
24 sedentary work, with postural limitations on his ability to "stoop,  
25 crouch, crawl, kneel, balance, climb stairs or ramps and reach  
26 overhead." (Tr. 25.) He found Plaintiff's mild to moderate pain  
27 would not affect his ability to perform work. (*Id.*) The ALJ the  
28 determined Plaintiff's statements regarding his symptoms and

1 limitations were not credible "to the extent that they would prevent  
2 him from performing the wide range of sedentary work" described in  
3 the ALJ's residual functional capacity (RFC) assessment. (Tr. 27.)

4 After considering VE testimony the ALJ found Plaintiff was  
5 unable to perform his past relevant work. (Tr. 28.) At step five  
6 the ALJ found Plaintiff could still perform a significant number of  
7 sedentary jobs in the national economy, such as cashier, electronic  
8 assembler, small product assembler, and garment industry jobs. (Tr.  
9 29.) The ALJ concluded Plaintiff was not under a "disability" as  
10 defined by the Social Security Act at any time from December 2,  
11 1999, through the date of his decision. (Tr. 27.)

#### 12 STANDARD OF REVIEW

13 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
14 court set out the standard of review:

15 A district court's order upholding the Commissioner's  
16 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
17 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
18 Commissioner may be reversed only if it is not supported  
19 by substantial evidence or if it is based on legal error.  
20 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
21 Substantial evidence is defined as being more than a mere  
22 scintilla, but less than a preponderance. *Id.* at 1098.  
23 Put another way, substantial evidence is such relevant  
24 evidence as a reasonable mind might accept as adequate to  
25 support a conclusion. *Richardson v. Perales*, 402 U.S.  
26 389, 401 (1971). If the evidence is susceptible to more  
27 than one rational interpretation, the court may not  
28 substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of  
Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

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**SEQUENTIAL PROCESS**

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The court considers the record as a whole, both evidence that supports and detracts from the Commissioner's decision. *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985). If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision

1 supported by substantial evidence will still be set aside if the  
2 proper legal standards were not applied in weighing the evidence and  
3 making the decision. *Browner v. Secretary of Health and Human*  
4 *Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If there is substantial  
5 evidence to support the administrative findings, or if there is  
6 conflicting evidence that will support a finding of either  
7 disability or non-disability, the finding of the Commissioner is  
8 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
9 1987).

10 In proceedings where a claimant is reapplying for disability  
11 benefits, the claimant cannot claim to be disabled during the period  
12 covered in the earlier proceedings. *Green*, 803 F.2d at 530. Upon  
13 re-application, the burden is on the claimant to show changed  
14 circumstances have caused his impairments to become more severe.  
15 *Id.*

#### 16 ISSUES

17 The question is whether the ALJ's decision is supported by  
18 substantial evidence and free of legal error. Plaintiff argues the  
19 ALJ erred when he: (1) assessed Plaintiff's credibility; (2)  
20 improperly rejected the opinions of his treating doctor; (3) failed  
21 to develop the record; and (4) failed to include all of Plaintiff's  
22 limitations in the hypothetical questions posed to the VE. (Ct.  
23 Rec. 15 at 8, 20.) Plaintiff also alleges the Appeals Council  
24 should have remanded the case to the Commissioner for consideration  
25 of new evidence. (*Id.* at 16.)

#### 26 DISCUSSION

##### 27 A. Credibility

28 Plaintiff asserts the ALJ's credibility determination is vague,

1 lacks specificity and is unsupported by the evidence. (Ct. Rec. 15  
2 at 17.) When the ALJ finds a claimant's statements as to the  
3 severity of impairments, pain and limitations are not credible, the  
4 ALJ must make a credibility determination with findings sufficiently  
5 specific to permit the court to conclude the ALJ did not arbitrarily  
6 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,  
7 958-959 (9<sup>th</sup> Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46  
8 (9<sup>th</sup> Cir. 1991) (en banc). An ALJ cannot be required to believe  
9 every allegation of disabling symptoms, even when medical evidence  
10 exists that a claimant's condition may produce them. For example,  
11 "[m]any medical conditions produce pain not severe enough to  
12 preclude gainful employment." *Fair v. Bowen*, 885 F.2d 597, 603(9<sup>th</sup>  
13 Cir. 1989). Although an adjudicator may not reject a claimant's  
14 extreme symptom complaints solely on a lack of objective medical  
15 evidence, medical evidence is a relevant factor to consider. *Social*  
16 *Security Ruling (SSR) 96-7p*.

17 If there is no affirmative evidence that the claimant is  
18 malingering, the ALJ must provide "clear and convincing" reasons for  
19 rejecting the claimant's allegations regarding the severity of  
20 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). The  
21 ALJ engages in a two-step analysis in deciding whether to admit a  
22 claimant's subjective symptom testimony. *Lingenfelter v. Astrue*, 504  
23 F.3d 1028, 1035-36 (9<sup>th</sup> Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273,  
24 1281 (9<sup>th</sup> Cir. 1996). Under the first step, the ALJ must find the  
25 claimant has produced objective medical evidence of an underlying  
26 "impairment," and that the impairment, or combination of  
27 impairments, could reasonably be expected to cause "some degree of  
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1 the symptoms." *Lingenfelter*, 504 F.3d at 1036. Once the first test  
2 is met, the ALJ must evaluate the credibility of the claimant and  
3 make specific findings supported by "clear and convincing" reasons.  
4 *Id.*

5 In addition to ordinary techniques of credibility evaluation,  
6 the ALJ may consider the following factors when weighing the  
7 claimant's credibility: the claimant's reputation for truthfulness;  
8 inconsistencies either in his allegations of limitations or between  
9 his statements and conduct; daily activities and work record; and  
10 testimony from physicians and third parties concerning the nature,  
11 severity, and effect of the alleged symptoms. *Light v. Social Sec.*  
12 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d at 597  
13 n.5. The ALJ may also consider an unexplained failure to follow  
14 treatment recommendations and testimony by the claimant "that  
15 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,  
16 1039 (9<sup>th</sup> Cir. 2008).

17 As explained by the Commissioner in his policy ruling, the ALJ  
18 need not totally reject a claimant's statements; he may find the  
19 claimant's statements about pain to be credible to a certain extent,  
20 but discount statements based on his interpretation of evidence in  
21 the record as a whole. SSR 96-7p. "For example, an adjudicator may  
22 find credible an individual's statement as to the extent of the  
23 functional limitations or restrictions due to symptoms; *i.e.*, that  
24 the individual's abilities to lift and carry are compromised, but  
25 not to the degree alleged." *Id.* If the ALJ's credibility findings  
26 are supported by substantial evidence in the record, "the court may  
27 not engage in second-guessing." *Thomas*, 278 F.3d at 959; *Fair*, 885  
28 F.2d at 604 ("credibility determinations are the province of the



1 ALJ").

2 Here, there is no affirmative evidence of malingering;  
3 therefore, the ALJ must provide "clear and convincing" reasons for  
4 discounting Plaintiff's statements. In explaining his basis for the  
5 RFC determination, the ALJ specifically noted Plaintiff's testimony  
6 that he spent most of the day reclined on the sofa, and could not  
7 sit for more than 45 minutes at a time, and could not walk or stand  
8 for more than one hour at a time. He specifically noted Plaintiff  
9 testified he could do household chores, cook, and shop while leaning  
10 on a cart. He was able to concentrate, watch television, read, and  
11 use the computer. He could maintain social contact with friends and  
12 relatives; and he enjoyed camping in the summer. The ALJ also  
13 referenced Plaintiff's report that he was "most comfortable" with  
14 his legs elevated; that he did all the driving for the family, and  
15 the heaviest he could lift or carry was a gallon of milk. (Tr. 26.)

16 In his credibility findings, the ALJ reasoned Plaintiff's  
17 testimony of daily activities was not consistent with the severity  
18 of exertional limitations alleged or a claim of total disability.  
19 (*Id.*) This is a "clear and convincing" reason to discount a  
20 claimant's subjective complaints. SSR 96-7p (consistency of  
21 statements by claimant is a strong indication of credibility).  
22 Further, the record supports the ALJ's finding of inconsistent  
23 reports. For example, although Plaintiff testified to significant  
24 limitations in his ability to stand, sit or walk, he also reported  
25 he went camping, shopped, visited friends and relatives, and enjoyed  
26 surfing the internet and talking on the computer. (Tr. 243-44.) The  
27 ALJ properly determined the exertional and non-exertional abilities  
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1 required to perform these activities are consistent with a sedentary  
2 level of work. (Tr. 28.)

3 In assessing credibility, medical evidence is also an  
4 appropriate factor to consider, as long as it is not the only  
5 factor. SSR 96-7p. A lack of objective medical evidence to support  
6 the degree of severity alleged is a "clear and convincing" reason  
7 for discounting a claimant's self-report. *Id.* Here, in addition to  
8 the reasoning discussed above, the ALJ found the documented medical  
9 diagnosis of mild degenerative changes in the thoracic spine region  
10 did not support Plaintiff's complaints of low-extremity swelling or  
11 his self-reported need to keep his legs elevated while sitting.  
12 (Tr. 26.) This finding is supported by the record, which includes  
13 August 2006 imaging results indicating some slight spurring, but  
14 otherwise normal knees with no effusion.<sup>2</sup> (Tr. 187.) As found by  
15 the ALJ, medical records do not reflect a diagnosed medical  
16 condition or complaints of low extremity swelling that would require  
17 leg elevation. (Tr. 26; see, e.g., Tr. 189-90.)

18 Early 2003 clinic notes document shoulder and neck discomfort.  
19 (Tr. 166, 168.) In October-November 2003, Plaintiff complained of  
20 shoulder and knee pain when he talked to Jeremy Lewis, D.O.,  
21 Plaintiff's treatment provider. Dr. Lewis observed Plaintiff was  
22 moving "fairly easy, no distress," had had knee surgery and a normal  
23 knee x-ray. (Tr. 170.) However, there are no physician reports  
24 reflecting the degree of impairment Plaintiff claimed at the

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26 <sup>2</sup> As discussed below, an earlier x-ray showed an extensive tear  
27 in Plaintiff's knee which was surgically repaired in October 2005.  
28 (See Tr. 241.)

1 hearing. As found by the ALJ, the record shows surgery relieved  
2 Plaintiff's shoulder pain and severe knee pain; Plaintiff's  
3 medication regime was not long-term; and he was treated  
4 conservatively for flare-ups of musculoskeletal symptoms. (Tr. 26,  
5 173, 177, 179, 182.) The record supports the ALJ's finding that  
6 objective medical evidence does not support the disabling functional  
7 limitations reported by Plaintiff. (Tr. 26.)

8 Plaintiff correctly notes there is no requirement a claimant be  
9 "totally incapacitated" to be found disabled under the Social  
10 Security Act. *Vertigan v. Halter*, 260 F.3d 1044, 1049-50 (9<sup>th</sup> cir.  
11 2001). However, as explained by the ALJ, although Plaintiff's  
12 symptom allegations are not entirely credible, the record shows  
13 Plaintiff was able to perform physical and mental activities  
14 consistent with the unskilled sedentary work identified by the VE.  
15 (Tr. 26-29, 257-59.) Viewing the record as a whole, the ALJ's  
16 credibility findings are legally sufficient and supported by  
17 substantial evidence; therefore, they may not be disturbed on  
18 review. *Tackett*, 180 F.3d at 1098.

19 **B. Evaluation of Medical Evidence**

20 Plaintiff contends the ALJ improperly rejected Dr. Jones'  
21 assessment of functional limitations and his opinion that Plaintiff  
22 was not capable of sedentary work on a full time basis. (Ct. Rec.  
23 15 at 11.) Plaintiff then argues, somewhat conversely, that the ALJ  
24 should have ordered an additional physical capacities evaluation if  
25 he felt Dr. Jones, did not have the "requisite expertise" to assess  
26 functional limitations. (*Id.* at 16.)

1           **1. Dr. Jones' Medical Source Statement (MSS)**

2           The record shows Dr. Jones completed the MSS relied upon by  
3 Plaintiff on March 12, 2007, and concluded Plaintiff had not been  
4 capable of performing sedentary work on a "regularly and continuing  
5 basis," based on his exam, since January 2003. (Tr. 191-96.) Dr.  
6 Jones' form report concludes Plaintiff could sit, stand or walk for  
7 one hour at a time in an eight-hour day; sit or stand only two hours  
8 during the entire eight-hour day; walk one hour in the entire eight-  
9 hour day; and "must lie down" for one hour during the eight-hour  
10 day. (Tr. 193.) In another portion of the MSS, Dr. Jones opined  
11 Plaintiff could perform sedentary work for eight hours, five days a  
12 week with the opportunity to alternate sitting and standing. (Tr.  
13 192.) At the end of the report, Dr. Jones noted, "This is an  
14 estimate of his abilities. I would recommend a full functional  
15 capacity eval." (Tr. 194.)

16           If a treating physician's opinions are not contradicted, they  
17 can be rejected only with "clear and convincing" reasons. *Lester v.*  
18 *Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If contradicted, the ALJ  
19 may reject the opinion if he states specific, legitimate reasons  
20 that are supported by substantial evidence.<sup>3</sup> See *Flaten v. Secretary*  
21 *of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995).

22           The ALJ can meet this burden by summarizing the evidence,  
23 interpreting it and making findings. *Tommasetti*, 533 F.3d at 1041.

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25           <sup>3</sup> Dr. Jones' opinions are contradicted by reviewing agency  
26 physician, Norman Staley, M.D., who opined Plaintiff could lift and  
27 carry 10 to 20 pounds and stand and sit for six hours in an eight-  
28 hour day. (Tr. 148-54.)

1 The lack of medical support for doctors' reports based substantially  
2 on a claimant's subjective complaints of pain is a specific,  
3 legitimate reason for disregarding a treating physician's opinion.  
4 *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604. The ALJ need not  
5 accept a treating source opinion that is "brief, conclusory and  
6 inadequately supported by clinical finding." *Lingenfelter*, 504 F.3d  
7 at 1044-45 (*citing Thomas*, 278 F.3d at 957). Further, the court can  
8 read from the ALJ's summary of the complete record and draw  
9 inferences relative to the ALJ's findings and the treating  
10 physician's opinions. *Magallanes v. Bowen*, 881 F.2d 747, 755 (9<sup>th</sup>  
11 Cir. 1989).

12 The ALJ summarized Dr. Jones' progress notes dated from 1999  
13 through the date of the hearing. (Tr. 27-28.) Medical records  
14 relevant to the period after the August 2003 denial of benefits show  
15 after surgical intervention in September 2004 to repair Plaintiff's  
16 left shoulder, treating specialist Eric Bowton, M.D., noted  
17 remarkable improvement in Plaintiff's range of motion. Plaintiff  
18 reported discomfort in reaching overhead, but overall was doing  
19 well. (Tr. 139-44.) Medical notes indicate continued improvement  
20 until a re-injury of the shoulder in March 2005. By June, Plaintiff  
21 was reporting improvement in range of motion and functionality  
22 although there was still tenderness. (Tr. 176, 177). At this time,  
23 Plaintiff described his left knee as better, but still painful. (Tr.  
24 27, 177.) Physical examination showed stable knee condition and  
25 only slight crepitus and no effusion. (*Id.*) In August 2005,  
26 Plaintiff's knee was still painful, and x-rays showed an extensive  
27 tear at the medial menscus. (Tr. 183.) On examination, Dr. Jones  
28 noted no effusion, no ligamentous instabilities and 5/5 lower

1 extremity strength. (Tr. 182.) Clinic notes and hearing testimony  
2 indicate Plaintiff had knee surgery on or about October 10, 2005.  
3 (Tr. 184, 241.) It appears no detailed medical records describing  
4 the knee surgery were submitted by Plaintiff.

5 The last progress note from Dr. Jones before filling out the  
6 MSS is dated August 8, 2006; there is no indication of disabling  
7 limitations or pain. Rather, Plaintiff requested an examination of  
8 his back and knees before his insurance expired. (Tr. 186.) He  
9 reported pain primarily in his knees when "walking and up and about  
10 during the day," and localized back pain between the scapula. (Tr.  
11 186.) On exam, Dr. Jones observed mild symptoms, noting Plaintiff's  
12 knees were "ligamentously stable," and his back was "nontender to  
13 palpitation," with pain localized "in the region between the  
14 scapula." (Tr. 187.) New knee x-rays were unremarkable except for  
15 minimal spurring. (*Id.*) Dr. Jones recommended over the counter pain  
16 relief and joint supplements. (Tr. 186.)

17 Likewise, in the clinic note accompanying the MSS, Dr. Jones  
18 reported Plaintiff complained of back pain and joint pain, but  
19 denied paresthesias and difficulty walking. (Tr. 189.) His primary  
20 complaint was knee pain. On examination, both lower extremities  
21 exhibited "intact strength." (Tr. 190.) No changes in medication  
22 were recommended and no assistive devices were observed.

23 The ALJ specifically discussed Dr. Jones' MSS opinions and gave  
24 the functionality assessed little weight because the restrictions  
25 reported were not consistent with the rest of the record, diagnostic  
26 studies, or Dr. Jones' own clinic notes based on personal  
27 examination. (Tr. 28.) Rejecting a treating physician's opinion  
28 because it is inconsistent with his own notes is a specific,

1 legitimate reason for rejecting a treating opinion. *See Tommasetti*,  
2 533 F.3d at 1041; *Thomas*, 278 F.3d at 957. The ALJ also assigned  
3 little weight to Dr. Jones' MSS based on the doctors' acknowledgment  
4 that he was not an expert in functional capacity assessment. (Tr.  
5 28.) This explanation of the weight given is supported by  
6 substantial evidence and does not constitute legal error.

7 As directed by the Commissioner's policy rulings, a medical  
8 source statement is among several types of evidence which must be  
9 considered in the Commissioners' RFC assessment. SSR 96-8p.  
10 Further, controlling weight of a treating medical source opinion is  
11 warranted only if it is "not inconsistent with the other substantial  
12 evidence in the case record" and consistent with objective medical  
13 evidence. *Id.*; SSR 96-5p. Although Dr. Jones stated he was not "an  
14 expert" in assessing functional limitations (Tr. 189), his personal  
15 observations and contemporaneous clinical notes were properly  
16 considered by the ALJ and factored into the final RFC determination.  
17 It is noted on independent review that, the ALJ's hypothetical to  
18 the VE at step five incorporated Dr. Jones' MSS opinion that  
19 Plaintiff could perform sedentary work with a sit/stand option  
20 during the workday. (Tr. 192, 257-58.) The VE opined that the need  
21 to stand every 30-45 minutes would not eliminate the sedentary jobs  
22 identified. (Tr. 258.)

23 The court is mindful that the final RFC is a determination  
24 reserved to the Commissioner and is composed of more than the  
25 conclusions of one medical source. SSR 96-5p. The ALJ properly  
26 considered all evidence in the record, including imaging reports,  
27 the opinions of Plaintiff's treating specialists and primary care-  
28 givers, opinions of agency physicians and credible testimony from

1 the Plaintiff and his spouse. (Tr. 27-29.) There is no error in  
2 the ALJ's declining to give controlling weight to Dr. Jones'  
3 conclusory opinion on an issue reserved to the Commissioner, where  
4 as here, Dr. Jones' contemporaneous progress notes and other medical  
5 opinions in the record, reasonably support the ALJ's final RFC.

## 6 **2. The ALJ's Duty to Order Additional Evidence**

7 Regarding Plaintiff's argument that the ALJ should have ordered  
8 a formal physical capacities examination, Dr. Jones' notation is not  
9 sufficient to impose this obligation on the ALJ. A duty to develop  
10 the record "is triggered only when there is ambiguous evidence or  
11 when the record is inadequate to allow for proper evaluation of the  
12 evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9<sup>th</sup> Cir. 2001).  
13 As explained in the Regulations, consultative exams are purchased to  
14 resolve conflicts or ambiguities "if one exists" and to obtain  
15 needed medical evidence not in the file that is "necessary for  
16 decision." 20 C.F.R. §§ 404.1519a(a)(2), 416.919a(a)(2). The  
17 Commissioner has "broad latitude in ordering a consultative  
18 examination." *Reed v. Massanari*, 270 F.3d 838, 840 (9<sup>th</sup> Cir. 2001)  
19 (quoting *Diaz v. Secretary of Health and Human Services*, 898 F.2d  
20 774, 778 (10<sup>th</sup> Cir. 1990)). Further, the ALJ is required to seek  
21 additional evidence only if the evidence already present  
22 consistently favors the claimant. *Lewis v. Apfel*, 236 F.3d 503,  
23 514-15 (9<sup>th</sup> Cir. 2001). Here, ALJ Say did not indicate the record  
24 was insufficient to make a decision or that the evidence before him  
25 was ambiguous. The record and the ALJ's findings are consistent  
26 with objective imaging reports showing mild to moderate  
27 degeneration, and progress notes indicating improved range of motion  
28 after surgery, decreasing pain, conservative treatment, and mild to



1 moderate pain complaints. (Tr. 141-44, 173, 177, 179, 182.) The  
2 evidence is adequate to support the Commissioner's decision, and the  
3 ALJ was not obliged to develop the record further.

4 **C. Post-Hearing Evidence Submitted to the Appeals Council**

5 After the ALJ denied benefits on August 21, 2007, Plaintiff  
6 submitted an evaluation from physical therapist Cathleen Gephart,  
7 dated December 11, 2007, to the Appeals Council. (Tr. 8, 217-23.)  
8 The Appeals Council considered this evidence, but found it did not  
9 warrant changing ALJ Say's decision. (Tr. 5-8.) Although Plaintiff  
10 asserts the Appeals Council erred in failing to remand the matter to  
11 the ALJ for consideration of the new evidence, (Ct. Rec. 15 at 16),  
12 the decision of the Appeals Council is not a "final decision" of the  
13 Commissioner and is not subject to review by this court. *Califano*  
14 *v. Sanders*, 430 U.S. 99, 108 (1977)(judicial review is limited to  
15 the "final decision" of the Commissioner after a hearing); *see also*  
16 *Matlock v. Sullivan*, 908 F.2d 492, 493-94 (9<sup>th</sup> Cir. 1990)(a "final  
17 decision" is a decision on the merits). Judicial review is  
18 restricted to determining whether the ALJ's final decision is based  
19 on substantial evidence and is free of legal error. 42 U.S.C. §  
20 405(g).

21 Nonetheless, in the Ninth Circuit, if post-hearing evidence is  
22 considered by the Appeals Council, it is considered part of the  
23 record on review by this court. *Ramirez v. Shalala*, 8 F.3d 1449,  
24 1451-52 (9th Cir. 1993). If the new evidence shows there is a  
25 reasonable possibility that it would change the outcome of the ALJ's  
26 determination, then remand is appropriate to allow the ALJ to  
27 consider the evidence. If the substantial weight of the new  
28 evidence is irrefutably clear that the claimant is disabled, then a

1 remand for benefits is appropriate. *Mayes*, 276 F.3d at 462.

2 In this case, the Appeals Council considered the post-hearing  
3 evidence. (Tr. 6.) However, the evidence is not likely to change  
4 the outcome of this case. The opinions rendered are those of a  
5 physical therapist, an "other source" under the Regulations whose  
6 opinion regarding disability cannot be given controlling weight. 20  
7 C.F.R. §§ 404.1527(e), .1513(d); 416.927(e), .913(d); SSR 06-03p. In  
8 addition, the limitations were assessed in December 2007, four  
9 months after the ALJ rendered his decision, and are not relevant to  
10 the period at issue. As is the case with Dr. Jones' MSS, the  
11 severity assessed by Ms. Gephart is not consistent with the record  
12 in its entirety, including imaging reports. Because the evidence  
13 is neither relevant to the claimed period of disability, nor  
14 supported by substantial evidence in the record, remand for  
15 consideration by the ALJ is not warranted.

16 **D. Hypothetical Question**

17 Plaintiff's argument that the ALJ's hypothetical to the VE at  
18 step five is incomplete is unpersuasive. An ALJ may rely on  
19 vocational expert testimony if the hypothetical presented by the ALJ  
20 includes all functional limitations supported by the record and  
21 found credible by the ALJ. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217  
22 (9<sup>th</sup> Cir. 2005). As discussed above, the ALJ gave legally sufficient  
23 reasons for discounting Plaintiff's subjective complaints and the  
24 severe limitations opined by Dr. Jones in his October 2007 MSS.  
25 When limitations are properly rejected by the ALJ, it is not error  
26 to exclude these limitations in the hypothetical relied upon by the  
27 VE in his testimony. *Id.* Further, as found by the ALJ, although  
28 Plaintiff can no longer perform his past medium level, skilled work,

1 restrictions supported by substantial evidence do not preclude all  
2 types of sedentary work.

3 The VE testified that, even with limitations in his ability to  
4 sit or stand for extended periods of time, Plaintiff had the  
5 physical capacities to perform unskilled, sedentary work that  
6 permits Plaintiff to stand every half hour to an hour to relieve  
7 discomfort in his back and knees. (Tr. 257.) He specifically  
8 opined a significant number of sedentary jobs exist in the cashier,  
9 electronic assembling and garment industry occupational base that  
10 Plaintiff could perform. (Tr. 259.) The ALJ did not err in relying  
11 on this testimony at step five.

#### 12 CONCLUSION

13 The ALJ's findings reflect a rational interpretation of the  
14 record, and his determination of non-disability is based on  
15 substantial evidence and free of legal error. Accordingly,

#### 16 IT IS ORDERED:

17 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
18 **DENIED;**

19 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
20 **GRANTED;**

21 The District Court Executive is directed to file this Order and  
22 provide a copy to counsel for Plaintiff and Defendant. Judgment  
23 shall be entered for **Defendant**, and the file shall be **CLOSED**.

24 DATED March 11, 2010.

25  
26 S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE  
27  
28